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THE DISINCLINATION OF APPELLATE COURTS IN THIS COUNTRY TOWARDS SIMPLIFYING APPEALS AND THE FINAL DISPOSITION OF CAUSES ON APPEAL.

The case of Parkison v. Thompson, 164 Ind. 609, 73 N. E. 109, seems to us neither without predecessors nor successors and by no means lonesome as reflecting contemporary sentiment among courts not responsive to legislative attempts to have appellate courts finally dispose of cases brought before them instead of remanding for retrial.

An Indiana statute provided that in all cases not triable by jury and tried by a court or referee, "all questions of law and fact shall be reviewed by the supreme court and it shall be the duty of the supreme court to examine and review the evidence when the same is preserved by bill of exceptions and give judgment according to the right of the cause, regardless of the decision upon questions of fact or law made by the court below according to law and equity."

The court, after going into a sort of "shelling of the woods" about the superior position a trial judge has in judging of credibility of witnesses because of hearing them testify, seemed to think it had paved the way for saying that the legislative "shall" in the statute ought to be construed as "may," a construction seemingly as absurd as was ever attached to phraseology, when it is seen that questions both of *law* and *fact* come in the same sentence under the examination and review the supreme court has to make. We imagine the court not satisfied with such a construction and, therefore, are not surprised to find it also speaking in *resentment* of what it calls encroachment by the legislature on judicial domain by prescribing the manner and the mode in which the courts shall discharge their official duties.

To us it seems that when judicial dignity becomes so exalted, that it is too ornamental to respond to the principle in the maxim *interest reipublicae ist sit finis litium*, it becomes rather titular for the genius of democratic America. Not only that, but it out-Herods Herod as we show at page 39 of 72 Cent. L. J., how judges in a land of hereditary privilege and titles proceed. Shall it be thought that in England it is a case of *noblesse oblige*, while courts like that of Indiana must assert their dignity or it will be overlooked?

The Missouri Supreme Court seems not entirely unlike the Indiana court as we interpret the opinion in Smith v. Baer, 166 Mo. 392, 66 S. W. 166, to say nothing about the Shepherd contempt case in 177 Mo. 205, which latter case is possibly the most absurd of all American cases on that subject.

In Smith v. Baer, we find the supreme court discussing, *academically*, whether it could "review the facts as well as the law in any case, however it might have been tried." It is said by a majority that under the Missouri Constitution it can, "but it has not been its practice to do so except in extreme cases in actions at law, for the reason that experience has shown that it is not necessary to do so to insure a proper administration of justice."

This last clause shows how a court may seem blissfully ignorant of one of the greatest evils in our judicial system—inconclusiveness in our appellate courts—and how remand and remand and remand make of them agencies in increasing, instead of allaying, confusion in our law.

When we look at one of the old Constitutions like that of Connecticut, we can better understand how then, than now its supreme court was merely made a tribunal for the correction of errors of law, and we think the contention interesting, though clearly untenable, as that court decided, that a statute providing for a stenographer's transcript, duly verified, being incorporated in the record of a case appealed, meant to vest the court with jurisdiction to review

the evidence and decide questions of fact. Thresher v. Dyer, 69 Conn. 404.

What the court says is suggestive of the thought, that the facilities we enjoy in this way encumber rather than aid tribunals which do not pass upon questions of fact. The court said the requirement was "not for the purpose of retrying the facts upon which the judgment is founded, but in determining whether the alleged errors of law did intervene in the conduct of the trial. For such purpose the whole authentic story of the trial as it appears in the process of appeal may be considered. A statement of the testimony actually given is only necessary where the error in law of finding a material fact in the absence of evidence is claimed. Occasionally such statement may be useful in showing the conditions under which rulings in respect to evidence have been made and possibly in showing how principles of law, such as the burden of proof, or the legal effect of a contract found entered into and influenced erroneously conclusions of fact, or in explaining the meaning of language used by the judge in the finding. But in most cases burdening the appeal with testimony serves merely a useless and unjustifiable expense; and always so, when, as in this case, its real purpose is to obtain from this court a retrial of the facts on testimony."

But in the stenographic transcript in a court which will not pass upon facts we think there is much more of evil than benefit. In the first place, it conduces to a relaxation of attention by the trial judge. He does not have to keep so thoroughly in his mind the development of a case that is being heard by him and therefore his rulings are more in the way of passing upon abstract propositions of law.

In the second place, when a minute record of everything said and done comes before the appellate court, astute and laborious counsel magnify inconsistencies and induce the court to read the record with a microscope. Every time they will detect some error and then they consider whether it is so prejudicial as to demand reversal.

Herein we find the system which possesses a complete record following the antiquated practice adopted by courts which depended upon "notes of the judge." Modern courts have far more material upon which to base a judgment on the merits than was formerly had, but they use it in the detecting of flaws.

We beg to think also that the trial judge is not greatly more able to decide a case upon the merits than an appellate court with a complete record before it. The only advantage he has is in seeing and hearing the witnesses. We will admit this is something, but it is more than off-set by the fact that the appellate judges have constantly before their eyes everything that they said and with patience may better contrast and compare what is said. Also they are able better to consider the influence of documentary or oral evidence and to look at the proofs as a whole along with the argument and the printed briefs. They get a calm, undisturbed view of the whole situation with all the time they wish to consider it, and additionally the benefit of consultation.

Yet with all of these facilities and the urgent necessity of disposing of controversies, when there is so much less chance of deciding questions of fact erroneously, they cling to shibboleths about presumption of correct conclusion on facts by the trial judge!

Not only this, but knowing that a record may be presented in greatest accuracy of detail, it seems almost as difficult in some cases to get into an appellate court safely as it is for "a camel to pass through the eye of a needle." Our system in saying there is an appeal is also aware that a perfect record is always made in the trial of a case. Why not make the way of getting to the appellate court as simple and certain as the motion for new trial under the English Judicature Act? This could be by filing a motion for an appeal, issuing citation, giving a statutory supersedeas bond, and producing the transcription of the stenographic notes and copy of all documentary evidence they refer to, together with copies

of the pleading. Then give the appellate court authority to say, if the record is complete enough, or authentic enough, for the case to be heard—either partially or entirely. If not so deemed, let it make orders, either before or after the argument has been had, for what is, in completeness or certainty, to be supplied. If the English court does this, why not our courts?

In addition, let our statute require the appellate court to pass upon all facts, where the constitution does not require this to be done by a jury. It has always seemed to practitioners that our appellate courts lend a pleasingly attentive ear to a motion to dismiss—especially if a record is voluminous. If appellate courts will try to try a case, instead of searching for opportunity to avoid doing so, a great *head* of our procedure will pass into oblivion. C.

NOTES OF IMPORTANT DECISIONS

TRIAL—PARTICIPATION OF JUDGE BY EXAMINATION AND CROSS-EXAMINATION OF WITNESSES PREJUDICIAL TO ACCUSED.—The following comment by a correspondent is suggested to us, which we express our thanks for and cheerfully publish:

"The right of a trial judge to examine witnesses in any case is always a very delicate one. An interesting case on that question is that of Adler v. United States, 182 Fed. 464, decided by Fifth Circuit Court of Appeals. The court held that the action of the trial judge in taking part in the examination of witnesses was error, saying: 'The record shows that the trial judge cross-examined the defendant's witnesses at length, his cross-examinations supplementing the cross-examinations of the district attorney and the special counsel for the government, and, in some instances, exceeding theirs in length. These examinations by the judge were critical and appafently hostile to the witnesses. They led to many objections by defendant's attorneys and to spirited controversies between the attorneys and the judge.' Extracts from the record showing these examinations and controversies are given at some length in the opinion, and clearly show that the learned court was correct in condemning the action of the trial judge. It is always permissible, of course, for a trial judge to ask questions when it may be necessary to more clearly develop facts which may remain obscure after counsel on both sides have finished. But this is a judicial privilege which should rarely be exercised and then only with the utmost caution and without the slightest manifestation of the opinion of the court as to the facts. It is matter of common knowledge that a jury will usually defer largely to the opinion of the judge, if known, and it is especially prejudicial to a party in a case where the facts are doubtful or close, for the judge, either by word or any conduct which may express his views, though silently it may be, to indicate in the presence of the jury what those views are. The judges, of course, have a discretion in these matters, but it should be used discreetly and always with a sacred regard for the rights of both parties and only with a plain manifestation of impartiality. The opinion of the judge may be easily indicated to the jury by the questions he propounds or even by the manner or tone in which he conducts the examination. And it is only when this salutary guide is faithfully followed that the action of a trial judge in taking the examination of a witness, even in part, from counsel is proper."

There perhaps is more latitude allowed in federal courts as to this than generally in state courts, where the least intimation by the judge of any opinion on facts is jealously excluded. These latter courts may be perhaps restricted too narrowly, but what is allowed for a federal judge to do in instructing should not be stretched to active participation in a trial in such a way as to make him practically an attorney for the prosecution with all his fervor in the making out of a case.

MASTER AND SERVANT — WHETHER DUTY TO SECURELY GUARD MACHINERY IS ABSOLUTE, OR IS LIKE THAT TO KEEP WORKING PLACE SAFE.—A Wisconsin statute provides that: "All * * * gearing * * so located as to be dangerous to employees in the discharge of their duty shall be securely guarded or fenced." A trial court instructed a jury, among other things: "By securely guarding it is meant that the defendant should guard the gearing safely, that the persons who work about the building, should be secure against danger or violence while performing their work." The Supreme Court of that state held by a majority of four to three, that this instruction was error. West v. Bayfield Mill Co. 128 N. W. 992.

The majority went upon the theory, that the master was not required by the statute

to guarantee the safety or security of the guard, saying: "The principle involved is very closely analogous to the principles held applicable to the common law duty of an employer to furnish to an employee a safe place to work. That duty is to furnish a place reasonably safe; i. e., a place as safe and free from danger as other persons of ordinary care and prudence in like business and under like circumstances ordinarily furnish, subject only to the limitations as to obviously unsafe places as above indicated."

The minority inveigh strongly against this ruling and quote abundantly from prior Wisconsin decisions, none of which appears to us to have had the distinction treated of squarely involved, so far at least as quoted excerpts disclose, and it seems to us that had the writer of the dissenting opinion devoted his remarks to less of sarcasm and attempted ridicule, the views of the writer might have been more forcefully, as well as judicially, presented.

The intent of such statutes seems to us to point out merely, that, however reasonably safe a working place in which there was unguarded machinery may have been formerly esteemed to be, the statute meant to say it should no longer be so considered unless dangerous machinery is guarded. That being the purpose there was the same duty on the employer as before—make your working place safe, and in doing so observe the statutory rule as to guarding machinery, or the obligation to make it safe shall be deemed to have been disregarded. But to comply with this general obligation the master is not an insurer. Why should he be deemed an insurer as to a particular place and not as to the general place in which the former is? Let us illustrate: The master is bound under his general duty to see that a revolving wheel inclosed by a guard is machinery from which a band will not fly or that the machinery is not defective so that in swift revolution it will fly to pieces, but he does not guarantee either thing will happen. But if either the band should break or a wheel fly to pieces, a guard could not prevent it from injuring employees. Therefore "securely" is a relative term. But even say "securely" means to guard machinery as it is running, should it be said that a latent defect in construction is insured against? If the legislature merely meant to specify the kind of precaution that should be taken in a particular part of a working place, the master's duty is consistent over the whole working place, but to have him insurer as to one thing as regards safety and prudent as to all others ought to be plainly expressed. We know it has been ruled negligence per se to leave machinery unguarded, but is it right to do what one's best effort suggests in that regard and fail from no human fault?

FOREIGN CORPORATION—SERVICE ON STATUTORY AGENT AFTER CORPORATION'S WITHDRAWAL FROM STATE—The case of Hunter v. Trust Reserve L. Ins. Co. 31 Sup. Ct. 127, shows a suit in New York on five judgments obtained by default in North Carolina on service made on an agent there appointed by a foreign insurance company under condition of its being then allowed to carry on business.

The North Carolina statute provided that such appointment should "continue in force irrevocable so long as any liability of the company should remain outstanding in this commonwealth."

New York Court of Appeals held under the facts of the case that only one of the five judgments came under the faith and credit clause of the constitution, because there was a cessation of the duration of the agency under the North Carolina statute, as the claims upon which they were based were not contemplated by that statute, as they were not "outstanding in that commonwealth" at the time of the withdrawal of the corporation from the state.

It seems that the policies upon which these judgments were obtained were issued in other states than North Carolina and assignments of rights of action thereunder were made to a resident of North Carolina after such withdrawal.

It was claimed also that the company really carried on business in North Carolina after the formal withdrawal, but the court said what was done related to old business arranged through the company's office in New York, and what was done was in the way of merely carrying out its old contracts, "a duty which it could not evade, nor could the State even prevent it."

The contention then was urged that the language of the statute was not limited to the protection of resident policy holders, but was for the benefit of every litigant upon any cause of action. But it was considered the statute merely intended to protect contracts of insurance made in North Carolina. It was said: "The policies were not issued in North Carolina, and not having been issued on the faith of its laws were not entitled to their remedial sanction."

The Court of Appeals was affirmed and what is called graphic language by that Court is approved. It was said it was not intended: "To perpetuate a local forum to which, under guise of an assignment to some resident, non-residents of far distant states might flock for the purpose of instituting litgation upon contracts issued to them at their homes, against a corporation there readily subject to service, and which long before had attempted in good faith to withdraw from the jurisdiction thus hunted out."

The way in which this statute is construed, seems to carry the conclusion that whether the foreign corporations were still doing business in the state or not, service upon a statutory agent ought to be limited purely to those suits it is the interest of the state to protect. It was not necessary for the decision to go this far, but if there was an outstanding obligation as to which service on the statutory agent would be valid, while the corporation continued to do business in the state, it should not be defeated by the corporation's withdrawal therefrom.

DOES AN AMENDMENT IN THE LAW, CHANGING THE MANNER OF APPORTIONING ASSESSMENTS FOR MUNICIPAL IMPROVEMENTS, IMPAIR ANY VESTED RIGHT OF EITHER THE CONTRACTOR, THE PROPERTY OWNERS OR THE MUNICIPALITY?

It is now well settled that municipal corporations do not come within the rule of the Darmouth College case, under which the charters of private corporations were declared to be contracts, and as such protected by the constitutional prohibition against laws impairing the obligation of contracts. A municipal corporation is a mere agent of the state, and stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation.[1] But while the control of the sovereign is full, ample and supreme over public corporations, the existence of this power does not permit even the state to impair or destroy contract, property or vested rights owned by aliens, or citizens, and protected by constitutional guarantees.[2]

Where the legislature amends the law governing municipal improvements after the adoption of a resolution ordering street or sewer improvements, or, after the contract therefor has actually been executed, the question is presented whether any vested right of either the municipality, the property owners, or the contractor has been impaired. So far as the municipality is concerned, the decisions recognize no such contract relation, and it is generally admitted that the city itself can have no vested right to have the laws remain unchanged.[3] The conclusions of the courts in those cases where the rights of property owners are involved is, however, quite the contrary. In the case of Cincinnati v. Seasongood,[4] the facts were that on June 15, 1885, the Board of Public Works of Cincinnati, in accordance with the provisions of an Act of 1885, of the Ohio Legislature, declared by resolution the necessity for the improvement of part of Third street, and on October 26, 1885, passed an ordinance ordering such improvement made. In the year 1886, the city entered into a contract for the performance of the work, and on August 3, 1887, the improvement was completed and accepted. On March 11, 1887, the legislature of Ohio amended the law governing the apportionment of assessments for street improvements in such manner that the assessment of Seasongood was increased from $393.60 (if made according to the provisions of the law in force when the improvement was ordered) to $668.96, when made in accordance with the law as amended. The assessment was actually made in accordance with the amended law and at the proper time.

(1) New Orleans v. New Orleans Water Co., 142 U. S. 79, 91; Covington v. Kentucky, 173 U. S. 231, 242.

(2) Rader v. Southeasterly Road District, 36 N. J. L. 273, 276.

(3) Palmer v. City of Danville, 166 Ill. 42, 45; 46 N. E. 629, 630.

(4) 46 Ohio St. 296, 303.

and in appropriate manner, Seasongood questioned the legality of the assessment. The court, in passing on the objection, said: "It is reasonable to presume that the passage of the ordinance to improve the street was not without reference to existing rights and liabilities. The ordinance was doubtless passed in full view of the law as it then stood in regard to special assessments. It embodied the scheme of the street improvement, and in passing it the Board of Public Works could not have contemplated any assessments other than those which were then authorized by statute. The assessment was only in aid of the improvement scheme as declared in the improvement ordinance, and did not enlarge or diminish the rights or liabilities of the defendants at the date of the passage of such ordinance. By virtue of the law then in force, they were obligated to pay an assessment on the basis of 60.2 feet of frontage, but under an amendment of the same law after the passage of the improvement ordinance it is claimed they became liable on 104.5 feet. *In our view, under the prior act they became vested with a substantial right of which they could not be deprived by the operation of the subsequent law.* Under the constitutional prohibition, the general assembly has no power to pass retroactive laws. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past must be deemed retrospective or retroactive. * * * There is nothing in the language of the Act of March 11, 1887, passed after the ordinance to improve, which gives it other than a prospective operation; and *it cannot by judicial construction be made to act retrospectively to the impairment or destruction of vested rights.* In our view, if the property of the defendants is not to be assessed in the mode or manner prescribed by the Act of March 27, 1884, a vested right acquired under existing laws is taken away, and a new obligation is created, and a new liability imposed by an amendatory statute operating not only retroactively, but contrary to the equity and justice of the case. It is a general rule that retroactive laws which conflict with a state constitution, or which tend to divest vested rights of property, are void, and courts will always struggle to give laws a prospective construction or interpretation. * * * *It is a well-settled rule of law that statutes should not receive a retroactive construction, unless the intention of the legislature is so clear and positive as by no possibility to admit of any other construction.* We are not without adjudicated cases in Ohio and elsewhere, which go far to establish the rule that *the rights and liabilities of abutting owners growing out of special assessments for street improvements, are fixed by the law existing when the improvement is ordered.*"

The extent of this vested right of the property owner was defined and qualified in the case of Spokane v. Browne.[5] In this case the improvement was ordered under the Charter of 1885, but the assessment was made under the Freeholder's Charter of March 24, 1891. The court said: "The respondents contend that the city had no right to change the method of assessing the expenses for such improvements from the plan according to valuation to the later one of per foot front, and that the city should have pursued the original plan under which the work was ordered. It is contended that at the time the work was directed done under the previous charter, improvements of this sort could not be made except upon petition of property holders, or by a given vote of the council; and that the improvements in question were instituted and occasioned by and in pursuance of a petition from such property holders, or of some of them, owning lands in the vicinity. Furthermore, that a right of protest was given to such property owners to object to the proceedings at certain stages. It is contended that such property owners had a vested right to have the assessment levied according to the provisions of the ordinance

(5) 8 Wash. 317; 36 Pac. 26.

under which the work was done. A number of cases have been cited by respondents as sustaining this contention. In City of Cincinnati v. Seasongood (Ohio), 21 N. E. 630, it was held that the city should be governed in making the assessment by the law in force at the time of the passage of the improvement ordinance. This was a suit brought by the city against a property owner to enforce an assessment. In Houston v. McKenna, 22 Cal. 550, which was an action by a contractor against a property owner, it was held that the law relating to assessments in force at the time the contract was entered into became a part of the contract, which neither the legislature nor the city had a right to change thereafter. In our opinion, however, the cases cited by the respondents fail to sustain their contention. *What was such vested right? Not that the assessment should be collected in any particular manner, so far as property owners were concerned, but rather that they should not be called upon to pay in excess of a certain sum.* It does not appear in this case that the respondents have been in anywise injured, or that they have been called upon to pay in this action, or by this levy, any greater sum than they would have been required to pay in the original scheme of assessing according to valuation. Nor does it appear that they have been asked or required to make any earlier payment. In our opinion, in order for them to attack the assessment, it must appear that it has worked to their injury; otherwise they have no right to complain, for the manner of making the assessments and collecting the same is otherwise of no interest to them. * * * *The respondents' claim that they did have a vested right in the scheme first adopted must be sustained, but with the qualification that such vested right was not in the manner of making the assessment, nor of collecting it, but only in the amount which they should be called upon to pay, and possibly in the time of payment;* and, if they were not called upon to pay any more money, nor to make any earlier payment under the scheme subsequently adopted, they suffered no injury in the premises and cannot be heard to complain." The scope of the Court's reasoning in these two cases is so broad that further comment in this connection is unnecessary.

There remains the further question whether the contractor possesses any vested right which is protected from the operation of a retroactive law changing the manner of apportioning the assessments. One phase of this question was considered by the Court in Houston v. McKenna,[6] where it said: "The defendant insists that the assessment is void, because not made in accordance with the provisions of the Act of May 18, 1861, which was in force when the assessment was made, and which provides that the expense of construction of any street, or portion of a street, shall be assessed upon the lots of land fronting thereon, each lot or portion of a lot being separately assessed, in proportion to its frontage, at a rate per front foot to cover the total expense of the work. On the contrary, the plaintiff (contractor) contends that the law in force at the time the contract was made—the Act of March 28, 1895—controls the rights of plaintiff, and that the assessment, being made in accordance with that law, is valid. The difference between the statutes is simply this—the Act of 1859 provides that assessment shall be according to the value of the lots, and the Act of 1861, according to the street frontage of each lot. The plaintiff made the contract in view of the right, which the law then in force gave him, to resort to the property and its owners for payment of the work done in grading the street. In this respect, the law of 1859, so far as it regulated the extent and nature of the liability, formed a part of the contract, and could not be essentially changed without a violation of the constitution. *The act of 1861 changes the rights of the plaintiff and the liability of the property and its owners, by changing the extent of that liability—making some pay more and others a less sum than they would have been liable to pay*

(6) 22 Cal. 550, 553.

under the Act of 1859. Such a result can only be avoided by giving the Act of 1861 a prospective effect—that is, limiting its application to those contracts made after it took effect. *It is a well settled rule of law that statutes should not receive a retroactive construction, unless the intention of the Legislature is so clear and positive as by no possibility to admit of any other construction.* There is nothing in the language of the Act of 1861, amendatory of Sec. 36, which makes it necessary to give it a retroactive effect, so as necessarily to include contracts made before its passage, and it should therefore be construed to apply only to subsequent contracts."

The decision of Palmer v. City of Danville,[7] holding that the right of the contractor was not impaired by a change in procedure and method of apportionment among the lots, is apparently in conflict with the doctrine of Houston v. McKenna. However, an examination of the history of the case before the Illinois court reveals no actual conflict in opinion. When this case of Palmer v. City of Danville was previously before the Court, as reported in 154 Ill. 156, the Court held that the method of assessment provided by the improvement ordinance of November, 1890, was arbitrary and invalid in that it failed to apportion the costs of the improvement upon any principle or rule of equality, such as the frontage, area or value of the respective lots. The court reversed the case and ordered a re-assessment made in accordance with the rules of equaiity laid down in its decision. In 1895, the legislature enacted a statute governing the levy of improvement assessments and provided the equality required by the decision of the court; on October 25, 1895, the City of Danville passed an ordinance ordering a re-assessment of the expense of the improvement, adopting the method of apportionment provided in the Act of 1895. The contractor objected to the new method of apportionment on the ground that he had a vested right to have the assessment made in the manner provided in the original ordinance, and the case came before the Court on appeal a second time. In passing on this question, the Court held that "The right of the contractor that the city should proceed to levy according to law and some principle of equality the special tax to pay for the improvement was not impaired." While not expressly saying as much, in effect, the decision of the Court was that there can be no vested right in an invalid or unconstitutional method of apportionment, and that if the contractor desires to claim a vested right to a particular method of apportionment provided in his contract, he must first see to it that such method is valid and does not infringe any of the constitutional rights of the property owners.

A recent amendment of the improvement laws of Indiana (as yet unconstrued by the higher courts) provides a concrete example for the application of the principles governing such changes. Acts of 1909, pages 412 to 430, amends certain sections of the municipal code of 1905, changing the method of instituting public improvements, apportioning benefits, taking appeals and collecting delinquent assessments. Under the prior act, one-half the expense of street and alley intersections was assessed to, and became a lien on, the abutting property and the other half became a lien on the property on the intersecting streets for a block in each direction, while under the amendment of 1909, the entire expense of street and alley intersections is assessed to the city. In those cases where property owners took advantage of the provision for payment in ten equal annual installments, under the Act of 1905 (as amended in 1907), the installments could be foreclosed only as they fell delinquent, but under the amendment of 1909,[8] failure to pay any installment of principal or interest when the same becomes due, brings all installments of principal yet unpaid forthwith due and payable. The amendment contained no repealing clause; and, under the principle that an amendment "is to be construed as

(7) 166 Ill. 42, 45.

(8) Acts 1909, page 428.

incorporated in the original act and as a part thereof, the provisions of each harmonized and no clause of either to be left inoperative,"[9] it became a part of the original municipal code of 1905 which provided, in repealing all former laws, that "this repeal shall not affect any *right acquired*, franchise granted, or *contract entered into*, under any such former law."[10]

In those cases where the municipality had ordered an improvement and actually executed the contract for the work prior to the amendment of March, 1909, a nice question arises whether the city itself would be heard in objecting that the transfer of the expense of street and alley intersections from the property owners to the city violated any of its vested rights. It can readily be seen that the imposition of this expense which the city had not anticipated, and which it might have provided no funds to meet, would do a grave injustice, but in the absence of the provision of the enactment that "this repeal shall not affect any * * * contract entered into," the city would have no recourse, and would be obliged to submit to the supreme control of the sovereign that created it.[11] But it is well settled that statutes will not be given a retroactive construction, unless the intention of the legislature is so clear and positive as to imperatively require it.[12] As this amendment of 1909 contained no such imperative command, but became part of a law protecting "rights acquired" and "contracts entered into," the law in force at the time the contract was entered into would still be read into the contract, not, however, because the city had a vested right which the legislature could not impair, but for the reason that the legislature did not use language clearly and imperatively requiring a retroactive effect.

So far as the property owners are concerned, they cannot be heard to object to the changed manner of apportionment of the costs of improvement, for the reason that they can show no damage, as their assessments are materially lessened, and not increased.[13] Applying the doctrine of Spokane v. Browne (supra), that the vested right of the property owner is "not in the manner of making the assessment, nor of collecting it, but only in the amount which they should be called upon to pay, and possibly in the time of payment," a vested right of the property owner would, no doubt, be impaired by giving a retroactive effect to that portion of the amendment of 1909 rendering all the installments due upon the delinquency of one installment.

So far as the contractor is concerned, it has been urged that the amendment of 1909, if given a retroactive effect, impairs no vested right belonging to him, for the reason that it does not change the total amount of the assessments to be levied in his favor, but simply changes his remedy for collecting these assessments.

It is an acknowledged principle that a creditor by contract has a vested right to the remedies for the recovery of the debt which existed at law when the contract was made, and that the legislature of a state cannot take them away without impairing the obligation of the contract, though it may modify them, and even substitute others, if a sufficient remedy be left, or another sufficient one be provided.[14] While it has been said that "No attempt has been made to fix, definitely, the line between alterations of the remedy which are to be deemed legitimate and those which,

(9) Walsh v. State, 142 Ind. 362, 24 Amer. & Eng. Enc. (2nd Ed.) 712.

(10) Sec. 272 Acts 1905, page 410.

(11) Palmer v. City of Danville, 166 Ill. 42, 45; 46 N. E. 629, 630.

(12) Nicklaus v. Conkling, 118 Ind. 289, 292; Houston v. McKenna, 22 Cal. 550, 554; Cincinnati v. Seasongood, 46 Ohio St. 296, 304; Hall v. Banks, 79 Wis. 229, 235; Auffmordt v. Rasin, 102 U. S. 620; Medford v. Learned, 16 Mass. 215; New York Ry. v. Van Horn, 57 N. Y. 473; Haley v. Philadelphia, 68 Pa. St. 137.

(13) Spokane v. Browne, 8 Wash. 317, 36 Pac. 26.

(14) Memphis v. United States, 97 U. S. 293, 295; Goodbub v. Estate of Hornung, 127 Ind. 181, 191; Tennessee v. Snead, 96 U. S. 69, 74; Edwards v. Kearsey, 96 U. S. 595, 607.

under the form of modifying the remedy, impair substantial rights; every case must be determined upon its own circumstances,"[15] the great weight of authority is to the effect that a lien once given by law is not a remedy, but a vested right which cannot be affected by subsequent legislation.[16] The time when the lien vests varies with the provisions of the different statutes. The improvement law in question provides that the lien shall attach on the real estate at the time the contract is let,[17] while in the case of mechanic's liens, the statutes usually provide that the lien shall attach when the material is furnished, or the labor performed. There is authority for the proposition that where the law is amended after the execution of the contract but prior to the actual delivery of materials, the rights and duties of the respective parties are determined by the law in force when the contract was executed.[18] In this connection, the court, in Streubel v. Milwaukee Co.,[19] urges that "In this, as in all other cases where contracts are regulated by law, the parties are presumed to have acted with reference to it, to have consented to such conditions and duties as it imposed, and to have acquired such right as it gave. Their acts are to be interpreted by it." However, in some few jurisdictions, it is held that a lien given by statute to secure the fulfillment of a contract is not a part of the contract, but only a remedy for enforcing it, and that until perfected by foreclosure, or similar proceedings, it is entirely within the control of the legislature.[20]

The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its terms by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.[21] But the amendment of 1909 does more than change the remedy for the enforcement of the improvement lien. It destroys a lien that has already attached to certain parcels of lands abutting on the street improved, and on intersecting streets, and substitutes the provision for the payment of those assessments out of the general fund of the entire municipality. In Houston v. McKenna,[22] where the amendment changed the extent of the liability of the property owners by making some pay more and others a less sum, the court held that the vested rights of the contractor were impaired. The court, in Rader v. Southeasterly Road District,[23] in a decision going minutely into the distinction between change of remedy and impairment of vested rights, says: "It is clear that any legislation, the effect of which is to deprive the party of the power to resort to the person or any property, which, as the law stood when the contract was made, might have been taken or applied in satisfaction of his demand, is within the constitutional prohibition."

(15) Von Huffman v. City of Quincy, 4 Wall. (U. S.) 535, 553; Rader v. Southeasterly Road District, 36 N. J. Law 273, 277.

(16) Hughes v. Russell, 43 Ill. App. 430, 434; Hannahs v. Felt, 15 Iowa, 141, 144; Leak v. Cook, 52 Miss. 799, 802; Gathen v. Port Blakley Co., 8 Wash. 467, 36 Pac. 463; Streubel v. Milwaukee R. Co., 12 Wis. 67, 73; State Trust Co. v. Kansas City Co., 115 Fed. 367, 373; Wabash Canal Co. v. Beers, 2 Black (U. S.) 448, 452; Weaver v. Sells, 10 Kan. 609, 619; Handel v. Elliot, 60 Tex. 145, 148; Buser v. Shepard, 107 Ind. 417, 422; Goodbub v. Estate of Hornung, 127 Ind. 181, 191; Gunn v. Barry, 15 Wall. (U. S.) 610, in re Hope Co., 1 Sawy. (U. S.) 710; Christina v. Charlesville, 36 Mo. 610, 613.

(17) Acts of 1905, Section 108, page 289.

(18) Spangler v. Green, 21 Colo. 505, 508; Streubel v. Milwaukee Co., 12 Wis. 67, 74; Goodbub v. Estate of Hornung, 127 Ind. 181, 192.

(19) 12 Wis. 67, 74.

(20) Martin v. Hewitt, 44 Ala. 418; Woodbury v. Grimes, 1 Colo. 100; Templeton v. Horne, 82 Ill. 491; Frost v. Ilsley, 54 Me. 345, Watson v. N. Y. Central Co., 47 N. Y. 157; Wilson v. Simon, 91 Md. 1.

(21) Von Hoffman v. City of Quincy, 4 Wall. (U. S.) 535, 552.

(22) 22 Cal. 550, 553.

(23) 36 N. J. Law 273, 280.

That the contractor can successfully urge that this amendment of 1909 not only changes his remedy, but goes so far as to impair the obligation of his contract, would seem the correct deduction from these principles of constitutional law.

WILMER T. FOX.

Jeffersonville, Ind.

BAIL—SCIRE FACIAS.

WASHINGTON et al. v. STATE.

53 So. 416.

Supreme Court of Mississippi, November 14, 1910.

Proceedings on scire facias on a judgment nisi rendered on a forfeited bail bond are the same as in other civil cases. Where a question of fact is raised by the pleadings, and where defendants filed a plea averring that the principal had been taken by a mob and killed, and that they were therefore unable to produce his body as required by the bond, a question of fact was raised, which should have been submitted to a jury.

McLAIN, C.: An affidavit was made before a justice of the peace of Warren county, charging Sam Washington with murder, and after an investigation of the charge by said justice of the peace he was released on bond, conditioned upon his appearance at the circuit court of Warren county to answer said charge. S. C. Reagan and Andrew Washington became the sureties on the said bond. On failure of Sam Washington to appear and answer said charge, judgment nisi was taken, as provided by section 1468, Code 1906. A scire facias was issued, and after several terms the judgment nisi was called for trial, and the sureties on said bond appeared and filed a special plea to the writ of scire facias, issued on the judgment nisi, setting up in substance that Sam Washington had been taken by mob and lynched and killed, and that, therefore, they were for that reason unable to produce his body. This was denied by the state. Upon filing the above plea, the sureties demanded a jury to try the issue. The court refused to grant their request, and proceeded to try the matter himself, and, after hearing all the testimony, made the judgment nisi final.

There are many assignments of errors in this cause, but we will only consider the one complaining of the action of the court in refusing a jury to try the case. From the above statement of the case, it is clearly seen that this proceeding is one by scire facias, to make final a conditional judgment rendered against the defendants as sureties on a forfeited bail bond. It is a suit for the recovery of money, and the proceedings are civil, and not criminal, in their nature. Our statute is silent as to how the facts shall be tried in a case of this character; but it is equally true there is nothing in the statute which denies a trial by jury. It has been held by this court that the scire facias on a judgment nisi, rendered on a forfeited bond, is to be regarded as a declaration, as well as the process, or writ, by which defendant is summoned to appear. Curry v. State, 39 Miss. 511; Tucker v. State, 55 Miss. 454.

It occurs to us that the proceedings on a scire facias of this character are the same as in other civil cases, where a question of fact is raised by the pleadings. The issue raised by a plea of nul tiel record is one, of course, for the court to determine; but the character of the plea filed in this case raises a question of fact, and it should have been submitted to the jury. Cyc. vol. 5, 61-68; Labarre v. Fry's Bail, 9 Mart. O. S. (La.) 382; Short v. State, 16 Tex. App. 44; Hart v. State, 13 Tex. App. 555; Spencer v. Fish, 43 Mich. 227, 4 N. W. 168, 287, 5 N. W. 95. To inflict liability upon appellants in this cause requires the same kind of proof that would be required upon any simple contract to which they might be parties. By an erroneous conclusion on the facts by the trial judge, appellants would be harmed just as much as in any other case of a civil nature. It seems to us, if an inquiry by a jury was ever important to the citizen in any cause, appellants were entitled to it in a case of this character, and their request for one should not have been denied.

PER CURIAM. For the reasons above set forth by the Commissioner, this case is reversed and remanded.

NOTE.—*Jury Trial in Scire Facias on Recognizance in a Criminal Case.*—The principal case does not show what the Mississippi statute is. Authority is scant on this question, but three Missouri cases cite authority to the position herein below set out, and hold that under its statute no jury trial is demandable.

In these cases the Supreme Court of Missouri in holding that a jury trial is not demandable in scire facias on a recognizance distinguishes between that and a scire facias to revive a judgment. State v. Hoeffner, 124 Mo. 488; State v. Clifford id. 492; State v. Murman, id. 502. The Court said: "In a criminal case a proceeding on a forfeited recognizance is but the continuation of a proceeding already begun, while in a civil case it is more like an original action."

"It is a mere continuation of an original proceeding to enforce a debt confessed." "It is not the commencement of a civil or new action, but the writ recites the recognizance and a judgment of forfeiture, and requires the parties against whom issued to appear in court at the next regular term and show cause, if any they can, why final judgment shall not be entered against them for the amount of the recognizance so forfeited and execution issued therefor."

The Code provides that: "An issue of fact in an action for the recovery of money only, or of specific real or personal property must be tried by a jury." This statute was held not to embrace scire facias on an interlocutory judgment such as was entered against bail. These cases approved State v. Randolph, 22 Mo. 274.

In the Murman case it was said: "A scire facias upon a recognizance in a criminal prosecution is not a civil proceeding" so as to be a removable cause under the act of congress, citing Respublica v. Cobbet, 3 Dallas (Penn.) 467. It is said also it could only be prosecuted in the court in which it was taken and forfeiture is a conditional judgment in that court.

In Spencer v. Fish *supra* it appears that there was an action on a recognizance of bail, not a scire facias and there is no discussion at all but the case appears to have been tried before a jury and was reversed for erroneous instructions.

At page 61 of 5 Cyc. the text says: "In those jurisdictions where proceedings against bail are declared to be in the nature of a new suit, the bail, upon filing his answer, is entitled to a trial of his cause by jury," and the only cases cited to this statement is La Barre v. Fry's Bail *supra* and one other old Louisiana case.

In Hart v. State *supra* it was held that *scire facias* cases on forfeited bail bonds and recognizances were under the practice of that state to be considered criminal in character, "but in all proceedings after judgment *nisi* and issuance of *scire facias* liable, unless where otherwise expressly provided by statute, to be governed by the same rules as obtain in civil cases." This ruling merely determines to what court they should be taken on appeal, i. e. the court of civil or that of criminal appeals and they were sent to the latter.

The case of Short v. State *supra* involved the question of the right to a jury trial. The Texas statute provides that "any party to a civil suit is entitled to a trial by jury upon complying with the requirements of law." * * * "Trial by a jury in such cases would therefore be governed by the rules applicable to such trials in civil causes."

Constitutional provisions on the subject of jury trials remaining inviolate have not been construed usually to embrace any cases except those in which jury trials were accustomed to be had. The Short case alludes to such a provision, but merely by quoting it and certainly, if it was of force a mere practice of the court in calling the cases civil, if they were in truth criminal, cases would not indicate any close observance of its command in the kind of jury that was given. The Texas statute, while broader than the Missouri, did not exclude strictly recognition of the position taken by Missouri court that here was a mere continuation of a proceeding already begun, and that there was a conditional judgment which stood like a debt confessed.

The principal case places the right to a jury merely upon a plea raising a question of fact, and calls the proceeding a civil case. Generally we would think a statute denying jury trial would be held constitutional. C.

CORRESPONDENCE.

AN INTRODUCTION TO THE HISTORY OF THE DEVELOPMENT OF LAW.—BY HON. M. F. MORRIS.

Editor Central Law Journal:

This is a most remarkable book of 315 pages, remarkable in more respects than one; remarkable for its bias, its rash statements, its absolute lack of historic temperament and understanding, its contradictions, its general superficialness.

In the preface the author states that the book is the outgrowth of some lectures delivered before a post-graduate class of the University of Georgetown, and it may consequently be expected that other universities and law schools will adopt it as a text-book. If there had not been any such fear, we should not have troubled ourselves with a review thereof, but it would be too bad, if a book like this should succeed in obtaining a standing to which it is in no way entitled.

It is impossible to do much more than to send out a general warning; for a thorough review, it would be necessary to take up seriatim, almost every page of the book.

The book contains ten chapters, the first of which is called "Origin and Nature of Law, and the Law of Nature"; this chapter is remarkable first because it nowhere defines what law is, and next because it hopelessly mixes up religion, morals and law. In the preface, the author disclaims any pretensions to originality or novelty. We are not so sure about the first of these; there are some rather original ideas in the book, but maybe their appearance to us of originality can be accounted for on the ground, that while once accepted, they have generally been discarded some two hundred years ago, or so. As to novelty, however, the author is without doubt correct. There is nothing in the book newer than the first decade of the nineteenth century, although Pollock & Maitland and Guy Carleton Lee are thanked and praised in the preface.

As an instance of the author's confusion, let us cite a paragraph from page 13, written to prove that all human law emanates directly from God: "Suppose two shipwrecked men were thrown upon a desert island far removed from all human society, far removed from all its agencies and instrumentalities for the prevention and punishment of crime, and one in wantonness kills the other, is the act any less a crime, because it may never be discovered, because it may never be reached by the avenging arm of justice, because the social compact has never been in force in that remote region of the earth? Our conscience and our common sense rebel against the inference of any distinction between such a crime and that of the ordinary murderer within the pale of civilization."

We suffer from an embarras de richesse in knowing where to attack such a statement, but

let us confine ourselves to the answering of the author's question. Such an act is a sin, whether committed on a desert island far removed, etc., or in the court of appeals of the District of Columbia, but it is not a crime under the circumstances stated by the author; on the preceding page the author has said, very properly, that there is not, and never was an human society without some sort of law, but now he refuses to draw the corollary, that there can be no law without an human society; for one man, and he the sinner, is not an human society, and without human society there may be sins, but there can be no crimes.

The author asks the question: "What is law?" and proceeds to examine a number of pretended sources of law, and as his answer cites St. Paul (Romans XIII-1): "There is no power but of God," which he amplifies into saying: "Indeed, it would be entirely appropriate to say that all substantial law is divine, and that all just human law is merely regulation."

Still he calls "the theory of the divine right of kings to rule independently of their people, an infamous doctrine, which it is only necessary at this day to mention in order to insure its immediate repudiation." Notwithstanding this strong language, both theories are the purest sacerdotalism anybody can desire.

The author, however, evidently feels that he has not answered his own question, and he ultimately arrives at the conclusion that "law" is the "Law of Nature," which he defines as "the original law imposed by the Creator upon man simultaneously with the commencement of human existence."

Where shall we seek this original law? In the laws of Moses. But in the following chapters we learn that the same laws were in force among the Babylonians, Egyptians and others, at least one thousand years before the time of Moses.

Further on in the book, we are told that the real true law came from the Hellenes, and especially from the Areopagos of Athens. As we proceed, we learn that true law has its source in Gaius and Ulpian, Justinian and Trebonian, and the Roman jurists generally; and finally Lord Mansfield and Napoleon are held up as very fountain heads of law.

Incidentally, the author has discovered that the Common Law of England is a remnant of semi-barbaric times, but he comforts himself with the conviction that it is now practically dead; he evidently overlooks, for instance, that such monstra as the "Fellow-Servant Rule" and the "Contributory Negligence Rule" could not possibly have been conceived and enunciated by any other known civilized system of law than the common law of England, and could not possibly be maintained, unless the system fostering them was very much alive; the first of which perverts the rule "that every man takes the risk of his work" into the rule "that every man takes the risk of his employment," and the other of which contorts the rule "that every man takes the risks of his acts" into the rule "that no man takes the risk of his acts when the damage done thereby has been partly caused by negligence of the person suffering the damage."

The author's trouble seems mainly to be that in his studies of philosophical law he has not reached any further than Rousseau, and to some extent Bentham; he is still fighting the windmills of the eighteenth century. The whole development of the science of law during the last one hundred years has entirely escaped him; he does not even mention von Savigny. He does not know, that law is now generally recognized to be a province of morals, viz.: that province in which its rules need force for their enforcement, and where force can be applied without destroying the morality of the rule. For instance: It is a moral precept that a husband shall support his wife; such a precept can be enforced without losing its morality, and is therefore a proper subject for legal regulation. It is equally a moral precept, that a husband shall love his wife, but such precept cannot be enforced, and any attempt to enforce it would in itself be immoral; hence legal regulation of this subject is impossible and improper.

If the author had known this, or seen this, he would have discovered the common scientific basis of law, upon which all men can meet and work together, whether Christians or Jews, Mohametans or Budhists, Believers or Infidels, and the discussion and scientific development of law need not be hampered by disagreements about the force that sets the world in motion and keeps it going.

In the very beginning of his book, the author puts his face squarely against the theory of evolution, and maintains that barbarism and savagery are not original states of humanity, but are results of a fall from an earlier and more civilized condition. Be this as it may, this way of looking at things has caused a peculiar, and at times rather amusing state of the author's mind. He delights in speaking, with a slur, of his "barbarian ancestors," and he is quite impatient and indignant with these same ancestors, because they were barbarians or semi-barbarians at the time they broke into the Roman Empire.

We cannot recommend this book as a serious attempt to answer the questions it raises, nor as a reliable digest of the information it undertakes to convey, but it deserves the praise of being quite entertaining.

AXEL TEISEN.

Philadelphia, December, 1910.

HUMOR OF THE LAW.

Two young lawyers, members of the bar but a few weeks, had grown rather obstreperous in the office of one of the court clerks, says Success.

"Here, you get out of here" said the clerk.

"We don't have to," the more talkative one promptly answered. "We've got a right in here; we're lawyers."

"Ah, go on," the clerk replied, "you are nothing of the kind."

"Sure we are," the spokesman rejoined. Then, turning to his comrade, he commanded, "Buck, go over and get your sign."

Lawyer—"Am I to understand that your wife left your bed and board?"

Uncle Ephraim—"Not 'xactly, boss. She dun tuk mah bed an' bo'd along with her."—Puck.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

Arkansas.....2, 20, 23, 41, 43, 63, 81
California.....18, 69, 70, 96, 117
Georgia.....45
Idaho.....99
Illinois....1, 21, 27, 31, 42, 61, 104, 109, 113, 116, 119.
Indiana.....34, 40, 62, 85, 98, 115, 118, 121
Iowa.....37, 66
Kansas.....3, 46, 49, 77, 88, 90
Kentucky.....6, 7, 33, 48, 53, 60, 93
Maryland.....73
Minnesota.....68, 75
Mississippi.....10, 74, 107
Missouri.....4, 35, 105
Montana.....47, 72
Nevada.....28, 114
New Hampshire.....39, 89
New York.....17, 32, 52, 54, 80, 83, 95, 106, 108
North Carolina.....24, 94, 101
North Dakota.....92
Oklahoma.....11, 97
Pennsylvania.....84, 122, 123
South Carolina.....55, 67, 86
South Dakota.....19, 22, 36, 44, 56, 102, 111, 112
Texas....5, 8, 9, 25, 26, 30, 38, 50, 58, 65, 71, 76, 78, 82, 91.
United States C. C......13, 15, 57, 103
United States D. C......12, 14, 16, 29
Washington.....87
Wisconsin.....51, 59, 64, 79, 100, 110, 120

1. **Account Stated**—Retention of Account.—Where an ordinary business account has been transmitted from one individual to another, it will be deemed a stated account, unless objection is made within a reasonable time.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

2. **Action**—Costs.—Courts held not entitled to require payment or security for costs before commencement of new action after voluntary dismissal of former action.—Turrentine v. St. Louis Southwestern R. Co., Ark., 131 S. W. 337.

3. **Attachment**—Rights Acquired.—An attaching creditor is not entitled to the rights of a purchaser for value buying on the strength of a record title.—Julian v. Eagle Oil & Gas Co., Kan., 111 Pac. 445.

4. **Attorney and Client**—Notice on Attorney.—The common-law rule that notice to an attorney of record is notice to his client held to apply only to notices arising in the progress of the cause.—Konta v. St. Louis Stock Exchange, Mo., 131 S. W. 380.

5. **Assignments**—Actions by Assignee.—A bank may sue upon claims assigned to it, regardless of the equitable ownership, where the assignment was not a sham.—Continental Oil & Cotton Co. v. E. Van Winkle Gin & Machine Works, Tex., 131 S. W. 415.

6. **Assignments for Benefit of Creditors**—Fraudulent Conveyances.—The rights of the assignee for creditors as to fraudulent conveyances held not those of the debtors, but those of the creditors.—Walton v. American Investment Co.'s Receiver, Ky., 131 S. W. 275.

7. **Assault and Battery**—Admissibility of Evidence.—In an action for assault, evidence of the truth of charges made by plaintiff against defendant held inadmissible; the fact that charges were made being admissible only in mitigation of punitive damages.—Sparks v. Sipple, Ky., 131 S. W. 389.

8. **Banks and Banking**—Authority to Endorse Checks.—A bank, paying checks drawn on the account of an employee created by the indorsement of his employer's checks, could not relieve itself from liability to the employer on the ground that the employee was acting within the apparent scope of his authority.—Knoxville Water Co. v. East Tennessee Nat. Bank, Tex., 131 S. W. 447.

9.——Collections.—A bank receiving a draft for collection will be liable for the negligence of subsequent agents employed in the collection.—First Nat. Bank v. Quinby, Tex., 131 S. W. 429.

10.——Preferences.—One to whom the tax collector and treasurer of a county have assigned the preference which they have on insolvency of a bank in which they have deposited county money, held to lose no rights by failure to present for payment the checks also given them on the bank.—Commercial Bank of Brookhaven v. Hardy, Miss., 53 So. 395.

11.——Rights of Depositor.—Where a bank credits a depositor with check on another bank and sends it to a third bank for collection, and the bank to which the check was sent received the money, but closed its doors before remitting, the credit given the depositor may be annulled.—Bank of Big Cabin v. English., Okl., 111 Pac. 386.

12. **Bankruptcy**—Contempt.—The bankrupt, having delivered property to a third person after the institution of proceedings on the theory that the latter was the owner and that the bankrupt was only a bailee, held guilty of contempt.—In re Potteiger, 181 Fed. 640.

13.——Duty to Deposit Funds.—An assignee is required to deposit all money of the estate coming into his possession in a designated depository bank and has no right to retain therefrom fees for legal services or disbursements made by him.—In re Kyle, 181 Fed. 617.

14.——Filing Claims.—Filing or presentation of claims in some form in bankruptcy proceedings is essential to prevent them from being barred.—In re French, 181 Fed. 583.

15.——Pledges.—Cotton shipped by bankrupts to defendants under an agreement to pledge the same, but on a bill of lading to the order of bankrupts, with direction to notify defendants, which bill was retained by bankrupts until their bankruptcy, held not to have been delivered under the agreement, but to have passed to the trustee in bankruptcy.—Lovell v. H. Hentz & Co., 181 Fed. 555.

16.——Power of Trustee to Settle Suit.—A settlement, agreed to by a trustee in bankruptcy, by which he was to discontinue litigation to set aside a judgment against the bankrupt as an illegal preference, leaving such judgment a lien upon realty sold by the bankrupt by warranty deed which bound him to satisfy such judgment, held inequitable as against the grantee and beyond the right of the trustee which was no greater than that of the bankrupt.—In re Geiselhart, 181 Fed. 622.

17. **Benefit Societies**—By-Laws.—A fraternal benefit insurance order may adopt a by-law applicable to certificates thereafter to be issued which prohibits members from becoming engaged even indirectly in the business of manufacturing or selling liquors.—Graves v. Knights

of the Maccabees of the World, N. Y., 92 N. E. 792.

18. **Bills and Notes**—Acceptance.—An acceptor of a bill of exchange, blank as to date and amount, held not entitled, as against a bona fide holder, to deny his liability.—First Nat. Bank v. Trognitz, Cal., 111 Pac. 402.

19.——Possession of Note.—The possession of a negotiable instrument payable to order and indorsed by the payee in blank, is in itself sufficient evidence of the holder's ownership, rendering the payment to him valid unless he is known to the payor to have acquired possession wrongfully.—Parrish v. Dwinnell, S. D., 128 N. W. 145.

20. **Boundaries**—Establishment by Agreement.—Owners of adjoining land in dispute as to the boundary held bound by the line orally agreed on by them, when followed by possession with reference thereto.—Payne v. McBride, Ark., 131 S. W. 463.

21. **Bridges**—What Constitutes.—A bridge, at common law and under the statute, generally includes the abutments and approaches.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

22. **Brokers**—Duty to Obtain Highest Price.—An agent to sell, falsely representing that a certain amount was the value, and all that could be obtained, and secretly buying for himself, afterwards selling for the true value, held accountable for the excess.—Durand v. Preston, S. D., 128 N. W. 129.

23. **Cancellation of Instruments**—Instruments Subject to Cancellation.—An instrument not invalid on its face, though void at law, may be a proper subject for cancellation in equity.—McCracken v. McBee, Ark., 131 S. W. 450.

24. **Carriers**—Acts of Employees Off Duty—As affecting a carrier's liability for injury to a passenger, an employee traveling on a train off duty must be regarded as a mere passenger.—Penny v. Atlantic Coast Line R. Co., N. C., 69 S. E. 238.

25.——Delay in Delivery.—Where the delay in delivering freight is extraordinary, the burden is on the carrier in actions for damages for delay to show unusual conditions justifying the delay.—Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co., Tex., 131 S. W. 410.

26.——Delay in Transportation.—Where a consignor shipped goods to himself as consignee, the buyer not to obtain the bill of lading until payment of the draft attached, the consignor alone could sue for damages for delay of shipment.—Houston & T. C. Ry. Co. v. Robinson & Martin, Tex., 131 S. W. 444.

27.——Freight Rates.—In determining the reasonableness of freight rates, the various matters tending to influence the cost of the transportation should be considered.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

28.——Negligence.—The carrier sued for injury to a passenger from derailment of a train held required to repel every imputation of the slightest negligence.—Sherman v. Southern Pac. Co. Nev., 111 Pac. 416.

29.——Stock Yards Company.—A stockyards company owning tracks connecting its yards with trunk line railroads, which it operated alone with its own engines and crews, held a railroad company and a common carrier of freight subject to the provisions of Twenty-Eight Hour Law, 1906.—United States v. St. Joseph Stockyards Co., 181 Fed. 625.

30. **Chattel Mortgages**—Sale of Mortgaged Property.—In a prosecution for selling mortgaged property, the construction placed on the instrument by the parties could be shown to defeat the prosecution.—Stewart v. State, Tex., 131 S. W. 329.

31. **Constitutional Law**—Discretion of Officers.—Acts of officers charged with discretionary duties in the exercise thereof can be reviewed by the courts only for fraud, accident or mistake.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

32. **Contempt**—Punishment.—One cannot be punished for failure to comply with a judgment of a court, unless such failure be established with reasonable certainty.—Greenberg v. Polansky, 125 N. Y. Supp. 176.

33. **Contracts**—Acceptance.—A contract held complete on the mailing of the acceptance of the offer, or on sending a telegram accepting the offer.—Postal Telegraph Cable Co. v. Louisville Cotton Seed Oil Co., Ky., 131 S. W. 277.

34.——Implied Contracts.—A promise is implied on principles of equity and natural justice, and no implication to pay arises where the circumstances are such that the implication will be inequitable.—Irwin v. Jones, Ind., 92 N. E. 787.

35.——Offer and Acceptance.—To constitute a contract on the theory of an offer and acceptance, the offer itself must be complete and reasonably definite as to terms.—Northrup v. Colter, Mo., 131 S. W. 364.

36. **Courts**—Jurisdiction.—A court having jurisdiction over the person of a party to a suit held to have jurisdiction to compel him to execute a conveyance of real estate situated in another state.—Joy v. Midland State Bank, S. D., 128 N. W. 147.

37.——Right Given by Federal Statute.—A right given by a federal statute may be enforced in a state court, unless exclusive jurisdiction is reserved to the federal courts.—Bradbury v. Chicago, R. I. & P. Ry. Co., Iowa, 128 N. W. 1.

38. **Covenants** — Breach of Warranty. — A grantee may recover on his warranty only in the event of a recovery against him by the owner of a superior title.—Ward v. Nelson, Tex., 131 S. W. 310.

39. **Corporations** — Contribution. — It is the character of his liability, and not the form of action by which it is enforced, that determines the right of an officer of a corporation to contribution.—Coulombe v. Eastman, N. H., 77 Atl. 936.

40.——De Facto Corporations.—Before there can be a de facto corporation, there must be a valid law under which it may be formed, an attempt to incorporate, and exercise of powers.—Jennings v. Dark, Ind., 92 N. E. 778.

41.——Directors.—The management and control of the affairs of a corporation rest with its board of directors, and as a general rule the courts will not interfere at the suit of a minority shareholder to override and control the discretion of the directors.—Red Bud Realty Co. v. South Ark., 131 S. W. 340.

42.——Legal Existence.—A corporation can have no legal existence beyond the state creating it, except by authority of the state in which it wishes to act.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

43.——Lien on Stock.—The statute giving to a corporation a lien on the stock in the name of a stockholder to secure such stockholder's indebtedness to the corporation, it may enforce such rights to secure payment of indebtedness of and repayment of any funds misappropriated by such stockholder.—Red Bud Realty Co. v. South, Ark., 131 S. W. 340.

44.——Right of Receiver of Foreign Corporation.—A receiver of a foreign corporation appointed by the court of the origin of the corporation and considered as a court or common law receiver held not vested with the legal title to the real estate of the corporation situated in South Dakota.—Joy v. Midland State Bank, S. D., 128 N. W. 147.

45.——Subscription to Stock.—No officer of a corporation has authority to release any subscriber to the capital stock from his subscription.—Beam v. Floyd County Farmers' Union, Ga., 69 S. E. 225.

46. **Criminal Law**—Instructions.—It was not necessary for the court to charge that, the evidence being circumstantial, it was unnecessary for defendant's evidence to be of as high a grade as that of the state.—State v. Callahan, Kan., 111 Pac. 445.

47. **Damages**—Discretion of Jury.—Since it is practically impossible to prove with any degree of certainty the amount which a three year old child would have been able to earn during minority, had it not been injured, a wide discretion must be allowed the jury in determining the question under the circumstances of each particular case.—Flaherty v. Butte Electric Ry. Co., Mont., 111 Pac. 348.

48.——Personal Injuries.—One sustaining a personal injury may recover for impairment of the power to earn money, though only temporary.—Blue Grass Traction Co. v. Ingles, Ky., 131 S. W. 978.

49.——Punitive Damages.—A person who has no cause of action independent of his claim for punitive damages cannot recover such punitive damages.—Sondegard v. Martin, Kan., 111 Pac. 442.

50. **Deeds**—Validity.—A deed is void where, when executed, the grantor was incapable of understanding the nature of his act.—Caddell v. Caddell, Tex., 131 S. W. 432.

51. **Descent and Distribution**—Suit to Set Aside Deed.—A complaint by an heir to set aside a deed of his ancestor should state whether the ancestor died testate or intestate, and, if testate, his devisees, and it should state that the ancestor was seized of an estate of inheritance at the time of his death and should describe the premises.—Thomas v. McKay, Wis., 128 N. W. 59.

52. **Divorce**—Alimony.—Where a marriage was void ab initio, a wife, suing for a divorce, was not entitled to temporary alimony; she knowing of the invalidity of the marriage.—Dye v Dye, 125 N. Y. Supp. 242.

53.——Custody of Children.—The court, in making orders for the custody of minor children of divorced parents, must have principally in view the interests and welfare of the children.—Davis v. Davis, Ky., 131 S. W. 266.

54. **Discovery** — Purpose — The only purpose of defendant's application for an examination of plaintiff before trial held to be to obtain plaintiff's evidence in advance of the trial, and not to obtain evidence in support of defendant's own case, so that the application should have been denied.—Lawson v. Hotchkiss, 125 N. Y. Supp. 261.

55. **Dower**—Rights and Remedies of Widow. —In an action for dower, the widow need not allege the date of her marriage.—Woodward v. Woodward, S. C., 69 S. E. 232.

56. **Duration** — Adverse Possession. — A tax deed constituting a bare color of title, possession thereunder, and payment of taxes, held not to cut off the title of the owner.—Joy v. Midland State Bank, S. D., 128 N. W. 147.

57. **Eminent Domain**—Condemnation of Land. —A city under general authority only to condemn land for street purposes had no power to condemn part of a railroad's right of way for a street to be laid out longitudinally along the same.—Portland Ry., Light & Power Co. v. City of Portland, 181 Fed. 632.

58. **Estoppel**—Clothing Another with Apparent Title.—Where the owner of goods placed them in possession of another and allowed him to hold himself out as their owner, and a third person took a mortgage on the goods, the actual owner held estopped to dispute the possessor's apparent title.—B. F. Avery & Sons v. Collins, Tex., 131 S. W. 426.

59. **Evidence**—Contracts.—A contract, when ambiguous as viewed in the light of the subject-matter, though plain in its literal sense, may by extrinsic evidence showing the circumstances characterizing its meaning be read differently from its literal sense.—Klueter v. Joseph Schlitz Brewing Co., Wis., 128 N. W. 43.

60.——Parol Evidence.—Where the true intent of parties is not expressed in a written contract, they may show that the real contract was not reduced to writing through mistake.—Germer v. Gambill, Ky., 131 S. W. 268.

61. **Falsification**—Account Stated.—A bill to falsify an account stated must state the mistake with precision, and allege the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery was.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

62. **Frauds, Statute of**—Contracts Relating to Land.—A verbal contract for the sale of realty is not enforceable unless the purchaser takes possession, though the purchase money is paid in full, and the rule is the same where the consideration is personal services rendered and to be rendered.—Baxter v. Baxter, Ind., 92 N. E. 881.

63.——Pleading.—The statute of frauds as a defense is waived if not specifically pleaded.—El Dorado Ice & Planing Mill Co. v. Kinard, Ark., 131 S. W. 460.

64.——To Whom Statute Available.—A stranger to an oral agreement for sale of goods held not entitled to defend in an action against him on the ground that such agreement was invalid under the statute of frauds.—Draper v. Wilson, Wis., 128 N. W. 66.

65. **Fraudulent Conveyances**—Preferences. — That the value of property transferred by an insolvent to a preferred creditor exceeds the amount of the debt does not invalidate the transfer, if the value is reasonably proportioned to the debt.—Awalt v. Schooler, Tex., 131 S. W. 302.

66. **Garnishment**—Funds Subject To.—Generally, a creditor's right to garnish a fund depends on the debtor's right to receive it from

the garnishee.—What Cheer Savings Bank v. Mowery, Iowa, 128 N. W. 7.

67. **Guaranty**—Acceptance.—Notice of acceptance of a guaranty held necessary only when the proposition to make a guaranty comes from the guarantor.—J. L. Mott Iron Works v. Clark, S. C., 69 S. E. 227.

68. **Guaranty Insurance**—Principal and Surety.—A bond to indemnify one against loss from failure of the principal to perform the provisions of a building contract held a contract of insurance, and not of suretyship.—George A. Hormel & Co. v. American Bonding Co. of Baltimore, Minn., 128 N. W. 12.

69. **Husband and Wife**—Antenuptial Agreement.—An antenuptial contract held to make the wife a creditor authorized to collect her claim in the mode applicable to creditors of estates.—In re Warner's Estate, Cal., 111 Pac. 352.

70.——Enforcement of Trust.—A suit by a wife against her husband to establish and enforce a trust as to her separate property is not barred by laches, where the delay in suing did not legally prejudice the husband.—Title Ins. & Trust Co. v. Ingersoll, Cal., 111 Pac. 360.

71.——Living Together.—Husband and wife are living together when they occupy the same dwelling, eat at the same table, hold themselves to the world, and conduct themselves as husband and wife.—Levy v. Goldsoll, Tex., 131 S. W. 420.

72. **Homicide**—Self Defense.—Upon trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation or that justify or excuse it devolves upon the defendant, unless the proof upon the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that defendant was justified.—State v. Byrd, Mont., 111 Pac. 407.

73. **Indemnity**—Persons Entitled.—The general rule that, wherever the wrongful act of one person results in liability being imposed on another, the other may have indemnity from the person actually guilty of the wrong, is subject to the exception that as between actual tortfeasors the law will not enforce contribution or indemnity.——Baltimore & O. R. Co. v. County Com'rs of Howard County, Md., 77 Atl. 930.

74. **Injunction**—Remedy at Law.—The ground on which an action is sought to be enjoined being available in defense of the action, held, injunction will not lie.—International Harvester Co. of America v. V. P. Still & Son, Miss., 53 So. 394.

75. **Insurance**—Construction of Bond.—If a guaranty insurance bond is fairly open to two constructions, that construction should be adopted which is most favorable to insured.—George A. Hormel & Co. v. American Bonding Co. of Baltimore, Minn., 128 N. W. 12.

76.——Duty t Insure.—One under a duty to insure property of another is presumptively required to insure it for its full value.—Broussard v. South Texas Rice Co., Tex., 131 S. W. 412.

77. **Interest**—Unliquidated Damages.—In an action for unliquidated damages, the jury may not allow interest on the damages awarded.—Latham Mercantile & Commercial Co. v. Harrod, Kan., 111 Pac. 432.

78. **Landlord and Tenant**—Adverse Possession.—There having been nothing to show a repudiation of the relation of landlord and tenant, held, the tenant could not acquire title against the landlord by adverse possession.—Emporia Lumber Co. v. Tucker, Tex., 131 S. W. 408.

79.——Voluntary Surrender of Lease.—A tenant of a farm required by the lease to do plowing in the fall held not entitled to recover for such plowing, where in the spring following he voluntarily surrendered the farm.—Boyd v. Gore, Wis., 128 N. W. 68.

80. **Libel and Slander**—Damages. — Where some of the things said of plaintiff, suing for libel, are shown to be true, their truth, if establishing misconduct, must be allowed to affect the amount of the damages.—Keller v. American Bottlers' Pub. Co., 125 N. Y. Supp. 212.

81. **Liens**—Equitable Liens.—Where a stockholder wrongfully took corporate funds to discharge a lien upon his property, equity would impress upon such property still in his hands a lien for repayment of such money.—Red Bud Realty Co. v. South, Ark., 131 S. W. 340.

82. **Life Insurance**—Application.—An application for insurance in an old life insurance company calling for other insurance held not to require disclosure of accident policies and certificates in fraternal assessment orders and local societies.—Mutual Life Ins. Co. v. Ford, Tex., 131 S. W. 406.

83.——Burden of Proof.—In an action on a life policy, where the answer denied plaintiff's insurable interest, the burden was upon her to prove such interest.—Lawson v. Hotchkiss, 125 N. Y. Supp. 261.

84. **Limitation of Actions**—Accrual of Cause of Action.—Limitations held not to begin to run against an action to recover a deposit of money with a city made by a street railway company until conversion by the city.—Crawford County St. Ry. Co. v. City of Meadville, Pa., 77 Atl. 928.

85.——What Law Governs.—The statute of limitations in force when suit is brought governs the action, though it shortens or lengthens the limitation for enforcement of the right.—Sansberry v. Hughes, Ind., 92 N. E. 783.

86. **Logs and Logging**—Assignments of Contracts.—A vendor of timber, who consented to the purchaser assigning the contract, without releasing the purchaser from liability, held entitled to hold the purchaser for the balance due on the contract.—Munn v. Crow, S. C., 69 S. E. 229.

87. **Master and Servant**—Assumption of Risk.—A servant working near unguarded machinery, which under the factory act should be guarded, does not assume the risk.—Anderson v. Pacific Nat. Lumber Co., Wash., 111 Pac. 337.

88.——Dangerous Places.—It is negligence to place an employee in a dangerous place without warning when he is ignorant of the danger.—Turner v. Atchison T. & S. F. Ry. Co., Kan., 111 Pac. 433.

89.——Evidence as to Defective Tool.—In a servant's action for injuries, evidence of similar action by the machine which injured plaintiff on the day after the accident held admissible.—Cooley v. Eastern Wire-Bound Box Co., N. H., 77 Atl. 936.

90.——Failure to Guard Machinery.—Liability for failure to provide safe-guard to machinery attaches if the failure is a contributing cause of the injury.—Alkire v. Cudahy Packing Co., Kan., 111 Pac. 440.

91.——Obligation of Master.—A master who undertakes to furnish material of any kind to be used by a servant as a means for the performance of his work must exercise ordinary care to select proper and suitable material.—

Abilene Light & Water Co. v. Robinson, Tex., 131 S. W. 299.

92. **Mechanics' Liens**—Proceedings to Obtain.—Every step prescribed by the statute must be shown to have been substantially followed, or the lien does not exist.—Stoltze v. Hurd, N. D., 128 N. W. 115.

93. **Mortgages**—Foreclosure.—An action on a note payable to an alleged corporation, under the name of which an individual conducts business, and on the mortgage securing the note, must be brought in the name of the actual owner of the note and mortgage.—Day v. Ewen, Ky., 131 S. W. 283.

94.——Foreclosure.—Although the mortgage contains a power of sale, the court need not follow its provisions as to advertising the sale in an action of foreclosure.—McLarty v. Urquhart, N. C., 69 S. E. 245.

95.——Marketable Title.—Encroachment of bay window of a house 2½ feet over building line of street held not to make title unmarketable, so as to be ground for relieving the purchaser at foreclosure sale from his bid.—Ebert v. Hanneman, 125 N. Y. Supp. 237.

96. **Municipal Corporations**—Concurrent Corporations.—There cannot be at the same time within the same territory two distinct municipal corporations, exercising the same powers, jurisdiction, and privileges.—In re Sanitary Board of East Fruitvale Sanitary Dist., Cal., 111 Pac. 368.

97. **Nuisance**—Injunction.—Before equity will restrain a thing complained of as a nuisance, which is not a nuisance per se, and not declared such by a judgment of a court, a case of pressing necessity must be shown.—Clinton Cemetery Ass'n. v. McAtee, Okl., 111 Pac. 392.

98. **Payment**—Application to Debts.—The court will direct payments to be applied in such manner as to give the creditor the best security for obligations remaining unpaid.—Zuelly v. Caspar, Ind., 92 N. E. 785.

99. **Principal and Surety**—Contract of Suretyship.—A surety held bound by the construction placed on a building contract by his principal, where no fraud or collusion between the principal and owners appears.—Sanders v. Keller, Idaho, 111 Pac. 350.

100. **Railroads**—Crossing Accident.—Whether one before attempting to drive over a railroad track should stop held generally a question for the jury.—Swalm v. Northern Pac. Ry. Co., Wis., 128 N. W. 62.

101.——Duty in Approaching Crossing.—It is the duty of an engineer to give signals and exercise vigilance in approaching crossings.—Coleman v. Atlantic Coast Line R. Co., N. C., 69 S. E. 251.

102.——Frightening Animals.—A locomotive engineer on ascertaining that a team on an adjoining highway is frightened is bound to cease whistling until the peril is passed, in the absence of apparent danger to his train.—Lyons v. Chicago, M. & St. P. Ry. Co., S. D., 128 N. W. 134.

103. **Receivers**—Counsel Fees. — Attorneys employed by officers of a corporation after the appointment of a receiver, to resist the court's action, held not entitled to payment of their fees by the receiver out of the fund.—Barker v. Southern Building & Loan Ass'n, 181 Fed. 636.

104. **Religious Societies**—Conveyances. — A conveyance to the trustees of an incorporated religious society and their successors held a conveyance in trust for the use of the members of the congregation who adhere to a particular faith.—German Evang. Luth. Trin. Cong. v. Deutsche, etc., Gemeinde, Ill., 92 N. E. 868.

105. **Sales**—Implied Warranty.—There is an implied warranty of merchantableness in case of sale of ice to be manufactured.—St. Louis Union Packing Co. v. Mertens, Mo., 131 S. W. 354.

106. **Taxation**—Assessment.—Failure to make sufficient publication of the completion of an assessment roll held not to invalidate a tax levied thereon.—Joseph Fahys & Co. v. Vaughn, 125 N. Y. Supp. 280.

107.——Assessments.—The Legislature may provide what shall be a sufficient description of land in the assessment roll thereof, where the method is such as to point out with certainty the land assessed.—Reed v. Heard, Miss., 53 So. 400.

108.——Description of Property.—Where property is not assessed by the acre, the omission of the number of acres in the description in the assessment roll is unimportant.—Joseph Fahys & Co. v. Vaughn, 125 N. Y. Supp. 280.

109.——Foreign Corporations.—Property of a foreign corporation may be taxed by a state for the privilege of exercising its functions therein, if the amount of the tax is dependent on and fixed by the value of the property in the state.—State v. Illinois Cent. R. Co., Ill., 92 N. E. 814.

110.——Inheritance Tax.—The inheritance tax is a tax on the right of succession, and not on property.—In re Bullen's Estate, Wis., 128 N. W. 109.

111.——Injunction.—In a suit to enjoin the collection of taxes on horses as taxable in another county, statements in plaintiff's oath attached to his assessment statement held not admissible to prove that the property included in such statement included property taxable in other counties.—Morse v. Stanley County, S. D., 128 N. W. 153.

112.——Presumptions as to Assessment.—There is no presumption that an assessment statement of property assessed in one county covers any property except that situated in such county.—Morse v. Stanley County, S. D., 128 N. W. 153.

113. **Theaters**—Nuisance.—A theater is not a nuisance per se, and a declaration by a city would not make it a nuisance unless it was such in fact.—City of Chicago v. Weber, Ill., 92 N. E. 859.

114. **Trial**—Argument of Counsel.—Permitting counsel to draw an inference in his argument from failure of the opposite party to call witnesses held proper.—Sherman v. Southern Pac. Co., Nev., 111 Pac. 416.

115.——Special Findings.—Where there is not such conflict between special findings and a general verdict that both cannot stand, the general verdict will not be disturbed.—Baxter v. Baxter, Ind., 92 N. E. 881.

116. **Trusts**—Express Trusts. — Under the statute, an express trust must be manifested and proved by some writing signed by the party who is by law enabled to declare the trust.—Plummer v. Flesher, Ill., 92 N. E. 863.

117.——Management of Estate.—The question whether any interest shall be charged against a trustee, and, if any, how much, held to depend on the circumstances of each case.—Title Ins. & Trust Co. v. Ingersoll, Cal. 111 Pac. 360.

118. **Vendor and Purchaser**—Mistake as to Quantity.—Where, in the sale of land, both the purchaser and seller are of the belief that the tract contains a certain number of acres, on discovering that the acreage is deficient, the purchaser may recover for the deficiency.—Wolcott v. Moore, Ind., 92 N. E. 880.

119.——Notice.—A purchaser of real estate is chargeable with constructive knowledge of all facts which are obvious or might have been known by proper diligence.—Marx v. Oliver, Ill., 92 N. E. 864.

120. **Waters and Water Courses**—Flowage Rights.—Where flowage rights are established, the owner of the servient estate cannot impair such right, nor interfere or meddle with the territory so as to diminish its capacity for storage.—Lepper v. Wisconsin Sugar Co., Wis., 128 N. W. 54.

121. **Wills**—Annulment.—In an action to set aside a will and probate, plaintiff has the burden of showing by a preponderance of the evidence that testator did not have testamentary capacity as claimed.—Pepper v. Martin, Ind., 92 N. E. 777.

122.——Construction.—Where the terms of a will are doubtful, the law favors a primary, rather than a secondary, intent.—In re Long's Estate, Pa., 77 Atl. 924.

123.——Mental Condition of Testator.—On an issue devisavit vel non, the jury may consider testator's condition immediately prior and subsequent to the execution of the will to determine his mental condition when he executed it.—Surface v. Bentz, Pa., 77 Atl. 922.